United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

UNITED STATES COURT OF APPEALS
FILED
MAY 9 1977

77-7142

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ANTHONY HERBERT,

Plaintiff-Appellee,

—against—

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, INC., ATLANTIC MONTHLY COMPANY,

Defendants,

BARRY LANDO, MIKE WALLACE AND CBS INC.,

Defendant-Appellants.

ON APPEAL, PURSUANT TO 28 U.S.C. § 1292(b), FROM AN INTERLOCUTORY ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMERICAN SOCIETY OF NEWSPAPER EDITORS, CHICAGO SUN-TIMES, CHICAGO DAILY NEWS, THE MIAMI HERALD PUBLISHING COMPANY, NATIONAL BROADCASTING COMPANY, INC., THE NEW YORK TIMES COMPANY AND RADIO TELEVISION NEWS DIRECTORS ASSOCIATION AS *AMICI CURIAE*

RICHARD M. SCHMIDT, JR.
COHN AND MARKS
1920 L Street, N. W.
Washington, D. C. 20036
Attorneys for American Society of Newspaper Editors

DAN PAUL
PAUL & THOMSON
1300 First National Bank Bldg.
Miami, Florida 33131
Attorneys for The Miami Herald Publishing Company

JAMES C. GOODALE
Executive Vice President & Counsel
THE NEW YORK TIMES COMPANY
229 West 43rd Street
New York, New York 10036
Attorney for The New York Times Company

DANIEL FELDMAN
ISHAM, LINCOLN & BEALE
One First National Plaza
Chicago, Illinois 60670
Attorneys for Chicago Sun-Times and Chicago Daily News

CORYDON B. DUNHAM
Executive Vice President & General Counsel
NATIONAL BROADCASTING COMPANY, INC.
30 Rockefeller Plaza
New York, New York 10020
Attorney for National Broadcasting Company, Inc.

J. LAURENT SCHARFF
PIERSON, BALL & DOWD
1000 Ring Building
1200 18th Street, N. W.
Washington, D. C. 20036
Attorneys for Radio Television News Directors Association

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In the

United States Court of Appeals

For the Second Circuit

Anthony Herbert,

Plaintiff-Appellee,

—against—

Barry Lando, Mike Wallace, Columbia Broadcasting System, Inc., Atlantic Monthly Company,

Defendants,

Barry Lando, Mike Wallace and CBS Inc.,

Defendant-Appellants.

BRIEF OF AMERICAN SOCIETY OF NEWSPAPER EDITORS, CHICAGO SUN-TIMES, CHICAGO DAILY NEWS, THE MIAMI HERALD PUBLISHING COMPANY, NATIONAL BROADCASTING COMPANY, INC., THE NEW YORK TIMES COMPANY AND RADIO TELEVISION NEWS DIRECTORS ASSOCIATION AS *AMICI CURIAE*

This brief is submitted by American Society of Newspaper Editors, Chicago Sun-Times, Chicago Daily News, The Miami Herald Publishing Company, National Broadcasting Company, Inc., The New York Times Company and Radio Television News Directors Association, as *amici curiae,* in support of the position of Barry Lando, Mike Wallace and CBS Inc. ("CBS") on this appeal. The *amici* adopt the Statement of Facts set forth in the CBS brief as if separately set forth herein.

Interest of the *Amici*

The *amici* are publishers, broadcasters, editors and associations thereof. The American Society of Newspaper Editors is a nationwide professional organization of more than 800 persons holding positions as directing editors of daily newspapers throughout the United States. *The Chicago Sun-Times* and *The Chicago Daily News* are published by Field Enterprises, Inc. The Miami Herald Publishing Co. publishes, *inter alia, The Miami Herald.* National Broadcasting Company, Inc. operates television and radio networks and owns and operates television and radio stations. The New York Times Company publishes, *inter alia, The New York Times* and thirteen newspapers in Florida and North Carolina. Radio Television News Directors Association includes approximately 1300 members who are active in the supervision, gathering, reporting and editing of news and other information of public affairs broadcast throughout the nation.

A number of the *amici* have themselves been defendants in the major First Amendment litigations which set the background for this litigation and which established the body of case law which governs the resolution of the issues raised by this appeal to this Court. *E.g., New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964); *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974). All the *amici* believe that the issues raised by this appeal are, as the National News Council observed, "of major portent for the press, the law and the public at large." (*New York Times,* January 27, 1977, p. 22, col. 2, at col. 4). The *amici* further believe that the District Court opinion from which this appeal was taken sets a price on the exercise of the rights established by the *Sullivan* case and its progeny which is both inconsistent with the First Amendment and which

ignores the teaching—and underlying theory—of *Tornillo.* For that reason, the *amici* submit this brief to urge this Court to reverse the decision of the district court and to state as clearly and unequivocally as possible that the Federal Rules of Civil Procedure may not be applied, as did the District Court, in disregard of First Amendment principles themselves.

ARGUMENT

The CBS brief sets forth at length the salient legal principles which govern this appeal. The error of the District Court in discounting the relevance of cases such as *Tornillo;* the failure of the District Court to recognize the grave potential for journalistic inhibition inherent in its opinion; and the unwillingness of the District Court to accommodate—as this Court did in *Baker* v. *F&F Investment,* 470 F.2d 778 (2d Cir. 1972), *cert. denied,* 411 U.S. 966 (1973)—extremely strong First Amendment interests with the federal discovery rules are all expounded upon persuasively by CBS. We will not repeat those arguments here. To the CBS argument, we add the following.

1. The Inhibiting Effect of the District Court Opinion

The "Sixty Minutes" segment at issue in the *Herbert* case is an example of what has often been referred to as investigative journalism. It is a kind of reporting which, as Judge Harold Leventhal has observed, "has a distinctive role of uncovering and exposing abuses." *National Broadcasting Co.* v. *FCC,* 516 F.2d 1101, 1123 (D.C. Cir. 1974), *cert. denied,* 424 U.S. 910 (1976). One such reporter has observed that, as a general rule, it is:

> "... lonely, frustrating, tedious, and emotionally draining work. Starting out doubtfully with a flimsy hunch

> or an improbable-sounding tip, the investigative reporter must find out what someone else does not want him to know. He must make countless telephone calls to persons who will refuse to answer his questions, hang up on him, or never return his calls. He must knock on doors that will never be opened for him, even when he knows the person he is after is inside, with the shades pulled down and doors bolted tight.
>
> * * *
>
> "With somewhat greater difficulty, the investigative reporter must be able to recognize and disregard more lies than are told to a police detective in an entire career on the homicide squad. Many of these lies come from very respectable people—government officials, top business executives, judges, and lawyers—people who would never be suspected of such duplicity. 'Being lied to becomes so much a part of the investigative reporter's life,' remembered Robert M. Smith, an investigative reporter for the *New York Times* in pre-Watergate Washington, 'that once or twice a year he asks himself, "Why is this guy telling me the truth?" ' "
> L. Downie, *The New Muckrakers* 10-11 (1976)

In the context of such reporting, affirmance of the District Court's opinion could not help but have a paralyzing effect on the ability of journalists to do their work. For example, libel suits against the journalists engaged in writing about Watergate could easily have occurred. If they had, and if the District Court opinion in the *Herbert* case had been applied, the court's opinion presumably would have permitted those later indicted in the Watergate cover-up trial to require answers to questions as to why one lead was followed and not another, why one source was relied on and not another, and the like. Such compelled disclosures by the press to those about whom it is writing

or broadcasting would surely have an inhibiting effect—and particularly so on the smaller newspapers and broadcasters.

In fact, in the libel case that was commenced arising out of the Watergate revelations, a similar effort was made on behalf of those later convicted to take testimony from significant elements of the Washington press corps. In *Democratic National Committee* v. *McCord,* 356 F.Supp. 1394 (D.D.C. 1973), the District Court quashed subpoenas served upon ten reporters and management personnel. As noted by Judge Richey:

> "The subpoenas were issued to the Movants herein, who are reporters for, or managing personnel of, The New York Times, The Washington Post, the Washington Star-News and Time Magazine. In identical terms the subpoenas command the summoned members of the press to appear for depositions and bring with them all documents, papers, letters, photographs, audio and video tapes relating in any way to the Watergate 'break-in' or other political espionage operations against the DNC and associated organizations and individuals; all manuscripts, notes, or tape recordings of communications during the period June 17, 1972 through November 7, 1972, with a broad range of DNC officials and employees, persons connected with the McGovern-Shriver campaign, the FBI, the Metropolitan Police Department, or the United States Attorney's Office for the District of Columbia; and all drafts, copies, and final drafts of news material relating in any way to the Watergate break-in or other political espionage operations against the DNC or connected entities and individuals." (356 F.Supp. at 1395)

After first dealing with the scope of the subpoenas and concluding that they were not so broad as to be invalid under Federal Rule 26 of the Federal Rules of Civil Procedure, the Court turned to the issue of "whether these subpoenas to the press are valid under the First Amendment of the United States Constitution." Holding the subpoenas invalid, Judge Richey relied heavily on the fact that all alternative sources had not been exhausted before the issuance of a subpoena to the press and that the testimony sought did not go to the "heart" of the defendant's claims.

The Court concluded as follows:

> "[T]he Court notes that the First Amendment entitles the public to more than a right to know. It also requires that any incursions into the areas protected by the Bill of Rights will be given a prompt judicial inquiry and hopefully one that will not only be sound but which the public will also understand and accept. Government generally and the courts in particular must always stand first in the vanguard of upholding the spirit as well as the letter of the First Amendment freedoms which are among the most precious of a citizen's fundamental rights. This is what this Court understands legitimate and necessary 'strict construction' of the Constitution to be all about. This includes recognition of a special role for the press, for as written by James Madison:
>
> "'A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy or perhaps both.'
>
> "The Court will enter an order that subpoenas be quashed." (356 F.Supp. at 1398-99) (Footnote omitted)

The opinion on appeal to this Court, by ignoring the same First Amendment interests referred to in the *McCord* case —as well as the cases cited by CBS in its brief—threatens and would impair First Amendment interests of the highest import.

2. The *Baker* and *Cervantes* Approach

Both this Court in its ruling in the *Baker* case, and the Court of Appeals for the Eighth Circuit in its ruling in *Cervantes* v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), have clearly indicated the fashion in which the District Court should have approached the case before it.

In *Baker*, this Court observed, in the context of an appeal from the refusal of a District Court to require, in a civil case, disclosure of a journalist's confidential source, that:

> "[T]hough a journalist's right to protect confidential sources may not take precedence over that rare overriding and compelling interest, we are of the view that there are circumstances, at the very least in civil cases, in which the public interest in non-disclosure of a journalist's confidential sources outweighs the public and private interest in compelled testimony." (470 F.2d at 783)
>
> "If, as Mr. Justice Powell noted in [*Branzburg*], instances will arise in which First Amendment values outweigh the duty of a journalist to testify even in the context of a criminal investigation, surely in civil cases, courts must recognize that the public interest in non-disclosure of journalists' confidential news sources will often be weightier than the private interest in compelled disclosure.
>
> "It is axiomatic, and a principle fundamental to our constitutional way of life, that where the press remains

> free so too will a people remain free. Freedom of the press may be stifled by direct or, more subtly, by indirect restraints. Happily, the First Amendment tolerates neither, absent a concern so compelling as to override the precious rights of freedom of speech and the press. We find no such compelling concern in this case." (*Id.* at 785)

Baker thus establishes—contrary to the District Court opinion—that First Amendment interests will often prevail over demands for discovery in civil cases. On this basis alone, the *Herbert* ruling below should be reversed.

Cervantes establishes the same principle and suggests the additional one that the methodology that is to be followed by district judges in the context of ruling on First Amendment claims of journalists in *Sullivan*-libel cases should lead it to defer such rulings, if it is at all possible to do so, until the remainder of discovery in the case is completed, thus better enabling it to determine (a) the degree of need for the information *and* (b) whether the case might, even without disclosure of the information, be ripe for disposition on motion. As stated by the Court:

> "[T]o routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted upon the enforcement of State libel laws." (464 F.2d at 993) (Footnote omitted)

And, as further stated by it:

> "Where there is a concrete demonstration that the identity of defense news sources will lead to persuasive evidence on the issue of malice, a District Court should not reach the merits of a defense motion for summary

judgment until and unless the plaintiff is first given a meaningful opportunity to cross-examine those sources, whether they be anonymous or known. For only then can it be said that no genuine issue remains to be tried. Thus, if, in the course of pre-trial discovery, an allegedly libeled plaintiff uncovers substantial evidence tending to show that the defendant's published assertions are so inherently improbable that there are strong reasons to doubt the veracity of the defense informant or the accuracy of his reports, the reasons favoring compulsory disclosure in advance of a ruling on the summary judgment motion should become more compelling. Similarly, where pre-trial discovery produces some factor which would support the conclusion that the defendant in fact entertained serious doubt as to the truth of the matters published, identification and examination of defense news sources seemingly would be in order, and traditional summary judgment doctrine would command pursuit of further discovery prior to adjudication of a summary judgment motion." (*Id.* at 994)

The District Court in the *Herbert* case ignored all of these strictures: it assumed, contrary to *Baker*, that civil discovery must always take precedence over First Amendment claims in a *Sullivan*-libel case; and, contrary to *Cervantes*, it neither first inquired "into the substance" of the libel allegations of the plaintiff, nor required any demonstration of "substantial evidence" on plaintiff's part. It thus created a constitutional confrontation that might well have been avoided.

CONCLUSION

In Justice White's much quoted concurring opinion in *Tornillo,* he adverts to the fact that:

> "We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers." (418 U.S. at 259)

The experiences of the press in other nations has, if anything, grown more bleak since *Tornillo.* A recent summary prepared by the International Press Institute, a worldwide organization of editors and leaders of the press, radio and television, thus concludes that:

> "For those who believe deeply in freedom of the press as a fundamental human right, 1976 was a depressing year. Restraints on the media and the persecution of journalists throughout the world intensified to an unprecedented degree." P. Galliner, *Annual Review of World Press Freedom* 7 (Int'l Press Institute 1976)

Much of the unhappiness of the experiences of journalists abroad has been in the area of interrogation—of being required to respond to official inquiries as to why certain material was printed rather than other material. The District Court opinion in the *Herbert* case would—apparently routinely—permit such inquiries by public officials and public figures who have commenced libel actions. We urge this Court not to approve so damaging and dangerous a precedent.

Respectfully submitted,

RICHARD M. SCHMIDT, JR.
COHN AND MARKS
1920 L Street, N. W.
Washington, D. C. 20036
Attorneys for American Society of Newspaper Editors

DAN PAUL
PAUL & THOMSON
1300 First National Bank Bldg.
Miami, Florida 33131
Attorneys for The Miami Herald Publishing Company

JAMES C. GOODALE
Executive Vice President & Counsel
THE NEW YORK TIMES COMPANY
229 West 43rd Street
New York, New York 10036
Attorney for The New York Times Company

DANIEL FELDMAN
ISHAM, LINCOLN & BEALE
One First National Plaza
Chicago, Illinois 60670
Attorneys for Chicago Sun-Times and Chicago Daily News

CORYDON B. DUNHAM
Executive Vice President & General Counsel
NATIONAL BROADCASTING COMPANY, INC.
30 Rockefeller Plaza
New York, New York 10020
Attorney for National Broadcasting Company, Inc.

J. LAURENT SCHARFF
PIERSON, BALL & DOWD
1000 Ring Building
1200 18th Street, N. W.
Washington, D. C. 20036
Attorneys for Radio Television News Directors Association

Dated: May 2, 1977